Exxon Chemical Company *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO–CLC, Local 8–719. Case 4–CA–19288

July 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On October 31, 1991, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel filed an exception and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.[2]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) of the Act by refusing to grant the Union's designated expert access to its plant in order to gather data relevant to the processing of the Union's contractual grievance. In so finding, the judge applied the test set out in *Holyoke Water Power Co*., 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 477 U.S. 905 (1986). The Respondent concedes that *Holyoke* states the applicable legal test for determining the access issue; but it contends that the judge misapplied the test and that a proper application would lead to a finding that the Respondent acted lawfully in denying the requested access. For the following reasons we disagree.

The Union's access request was made in connection with a contractual grievance in which it alleged that the Respondent had changed the skill requirements for a job classification titled ''Multiskill Craftsman'' in such a way that it was no longer assigned the proper ''Labor Grade . . . in relation to all other job classifications established.'' This was a classification that, although included in both the 1987–1990 and the 1990–1993 collective-bargaining agreements, had never been filled until February 1990. The particular skills included in the classification were not specified in the agreement. The Union's grievance, which was filed in August 1990, cited ''actual experience in the position'' as the basis for the Union's belief that the classification was misgraded.[3] The grievance invoked article 24.3 of the bargaining agreement, which provides as follows:

> The Company has the right, during the terms of this Agreement, to add any job classification or change the duties of existing job classifications. The Company will set a rate for a new job classification or materially changed job classication. In setting the rate, the Company will set a rate that is consistent with the rates of pay in the hierarchy of job classifications and rates already established in the plant by taking into account the relationship between relative skills in existing job classifications and the new job classifications or the materially changed job classification. If the Union disagrees with the rate set by the Company, the union has the right to process a grievance starting at the second grievance step within thirty (30) days after the setting of the new rate. Any future grievance involving materially changed jobs will involve changes which occur after October 26, 1990.

The *Holyoke* test, which all agree applies here, is a balancing test under which access is to be granted if ''responsible representation of employees can be achieved only by the union's having access to the employer's premises'' and under which access can be lawfully denied if ''a union can effectively represent employees through some alternate means other than by entering on the employer's premises.'' Id. at 1370.[4] The Respondent contends that the judge considered only whether its property rights would be ''compromised'' and failed to determine whether the Union could achieve its representational objectives without

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent does not except to the judge's finding no merit in its affirmative defenses invoking Sec. 10(b), due process, waiver, and deferral to arbitration.

[2] We grant the General Counsel's exception and modify the judge's recommended remedy to provide that the Union's access to the Respondent's plant be granted, as requested, by its designated expert.

[3] Union President Elizabeth Bettinger, a witness whose testimony was generally credited by the judge, testified without contradiction that she had been informed by employees working in the multiskill craftsman classification that the description of the job given to them before they bid on it was different from the tasks they were assigned after they began working in that classification. The employees believed the job was assigned too low a grade.

[4] The test also specifies that any order directing an employer to grant access must be ''limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations.'' The Respondent does not argue that any grant of access would necessarily constitute an ''unwarranted interruption'' of its operations; and our modification of the Order (fn. 2, supra) merely substitutes the ''Union's designated expert'' for the ''Union'' and leaves intact the reasonable time limitations.

having its expert gain access to observe the skills the employees were using in the job classification. In particular, the Respondent argues that the judge improperly ignored ''uncontested testimony'' by the Respondent's human resources manager that the multiskill employees fill out daily logs recording the work done and that the Union could have satisfied its representational needs simply by requesting those logs. We disagree.

The judge made a finding that there was ''no adequate substitute for actual on-the-job observation of the work performed for the purpose of ascertaining what skills are actually utilized.'' Although the judge did not specifically advert to the employee logs, we see nothing in that evidence that undermines his finding. The manager's testimony does not indicate that the logs would provide any information beyond ''the type of job [and] number of hours.'' This is far from a sufficient basis for an assessment of the skills employed. Such logs would be inadequate also because the Union's grievance called for evaluating the job in relation to others ''in the hierarchy of job classifications.'' Logs filled out by multiskill employees could not show how their skills compared with those of employees in other labor grades, whereas on-the-job observation could. In sum, nothing in the record shows that the Union could obtain the complex data that an expert could collect on the basis of observing the employees at work in the plant.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exxon Chemical Company, Marlin, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Denying the Union's request for access by its designated expert to the Respondent's Marlin, Pennsylvania plant for reasonable periods of time at reasonable times in order to permit him to make an evaluation of the multiskill job classification that is relevant and necessary to the Union's performance of its responsibilities as the collective-bargaining representative of the Respondent's employees in a production and maintenance unit.''

2. Substitute the following for paragraph 2(a).

''(a) On request, grant the Union's designated expert access to the Respondent's Marlin, Pennsylvania plant for reasonable periods of time at reasonable times in order for the expert to evaluate the multiskill position, which evaluation is relevant and necessary to the Union's processing of the August 20, 1990 grievance relating to the appropriate placement of the multiskill classification within the hierarchy of all unit classifications.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Oil, Chemical and Atomic Workers International Union, AFL–CIO–CLC, Local 8-719, by denying its request for access by its designated expert to our Marlin, Pennsylvania plant for reasonable periods of time at reasonable times in order to permit the expert to make an evaluation of the multiskill job classification that is relevant and necessary to the Union's performance of its responsibilities as the collective-bargaining representative of our employees in the production and maintenance unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL, on request, grant the Union's designated expert access to our Marlin, Pennsylvania plant for reasonable periods of time at reasonable times in order for the expert to evaluate the multiskill position, which evaluation is relevant and necessary to the Union's processing of its August 20, 1990 grievance relating to the appropriate placement of the multiskill classification within the hierarchy of all unit classifications.

EXXON CHEMICAL COMPANY

Monica McGhie-Lee, Esq., for the General Counsel.
Charles E. Beck, Esq., for Exxon Chemical Company.
Neal Goldstein, Esq., for Local 8-719.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Pottsville, Pennsylvania, on July 15, 1991, pursuant to charges filed on October 15, 1990, and complaint issued on January 10, 1991, and amended at hearing. The amended complaint alleges Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to give the Union's timestudy expert access to Respondent's plant for the purpose of evaluating a multiskill job classification. Respondent denies the commission of unfair labor practices.

On the entire record,[1] and after considering the testimonial demeanor of the witnesses and the posttrial briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint, as amended at the hearing, alleges and Respondent admits it is a division of Exxon Corporation, a New Jersey corporation, and is engaged in manufacturing polyethylene and polypropylene blown film at a plant in Marlin, Pennsylvania. It is further alleged and admitted that, during the year preceding the issuance of the complaint, Respondent, in the course and conduct of these business operations, sold and shipped goods valued in excess of $50,000 from points directly outside the Commonwealth of Pennsylvania. It is alleged, admitted, and I find noting the Board has previously exerted its jurisdiction over various divisions of Exxon Corporation,[2] that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent and the Union were party to a collective-barganing agreement effective October 26, 1987, to October 26, 1990, and are now party to an agreement effective October 26, 1990, to October 26, 1993. Both agreements cover production and maintenance employees including those classified as multiskill craftsmen. No employees were assigned this classification until February 1990.[3] The employee so assigned in 1990 received a pay raise pursuant to an across-the-board wage increase negotiated for the entire unit during the 1990 negotiations for the current agreement. There is no evidence of any negotiation concerning the required skills, duties, or any other item peculiar to the multiskill classification. A grievance was filed by the Union on August 20 concerning this classification and reading, in pertinent part, as follows:

> The Job Description written did not actually describe all the skills required to perform the multiskilled job. Based on actual experience in the position it has been apparent the Company has materially changed the classification and as a result the Labor Grade assigned is not in relation to all other job classifications established.

Respondent's answer to the grievance reads: ''No contract violation. Grievance denied.''

There followed an exchange of letters. By letter of September 16 from its president and its chief steward, the Union notified Respondent the Union would pursue the grievance to arbitration and further stated: ''The Union is requesting to bring in our own time study expert to investigate the multi-skill job.''

This drew the September 21 response from A. J. Bauer, human resources manager for Respondent, that ''Your request to bring in a time study expert to investigate the multi-skill job (Grievance 125K) is denied.''

Then, by letter of September 2, Liz Bettinger, the Union's president, notified Bauer as follows:

> Re: Grievance #125
>
> The Company denied the Union's request to bring our own time study expert into the plant to evaluate the Multiskilled job pertaining to Grievance #125.
>
> However, you failed to give the Union any explanation why you denied our request for the evaluation of the Multiskilled Job.
>
> The Union has requested to bring this expert in to studythe job to further investigate this grievance and make a determination if we should pursue this grievance any further in the arbitration process.
>
> If the Company denies this second request please give us your explanation in writing when you have denied the Union's request to further investigate this grievance.

To this Bauer responded by letter of September 8 as follows:

> Dear Ms. Bettinger:
>
> Although I was unaware of any requirement to further explain my denial of your request for evaluation of the multi-skilled job, in the interest of open communication, I will elaborate on my initial response.
>
> The Company's denial of your request to bring a Union time study expert into the plant to evaluate the multi-skilled job (Grievance 125) is based on the fact that this job is not a piece work or incentive-based rate classification. Use of a time-study evaluation would have no impact on the current rate.
>
> Since this rate was negotiated in good faith and we are currently engaged in bargaining a new agreement, I would suggest that the proper forum to address your concerns regarding the appropriate rate for the multi-skilled classification is collective bargaining and not through the grievance procedure.

On October 15, the Union filed a charge with the Board alleging Respondent interfered with ''complainant's reasonable requests to investigate a grievance in order to evaluate whether or not the grievance should be pursued to final and binding arbitration.'' The complaint subsequently issued by the Regional Director for the Board's Region 4 alleges Respondent failed and refused to ''permit the Union access to the Marlin plant for an evalnation by a timestudy expert.'' Neither the charge nor the complaint nor the Union's request assert a timestudy would be conducted. Respondent contends, however, that the Union clearly requested a timestudy be performed, and that the complaint clearly alleges ''denial of access to permit a time study to be performed.'' The contentions are not persuasive. That Respondent chooses to argue that a request for access to enable a timestudy expert to investigate necessitates a conclusion the investigation can only

[1] All motions to strike and objections still outstanding are denied or overruled.

[2] See, e.g., *New Jersey Esso Employees Assn.*, 275 NLRB 216 (1985).

[3] All dates are 1990 unless otherwise indicated.

be a timestudy does not make it so, nor does it necessarily follow that a timestudy expert is incapable of conducting an appropriate investigation using methods other than a time-study. There is no showing whatsoever the Union's expert lacked the expertise to evaluate the multiskill job. Respondent knew from the language of the grievance that the questions it raised were the accuracy of the job description and the appropriateness of the labor grade assigned to the multiskill classification. I do not believe Respondent was misled by the Union's labeling of its expert as a timestudy expert into believing the Union was about to engage in an investigation inappropriate to the issues raised by the grievance. Furthermore, Union Officers Bettinger and Guidas credibly testified that Bettinger advised Albert Bauer, Respondent's human resources manager, in October that the Union wanted an evaluation rather than a timestudy. Bauer's bare denial that the Union ever explained the purpose of its request is not credited. Even if the prior requests had been deficient, which they were not, the request in October was clear and sufficient though made after the charge was filed. Compare *Hawkins Construction Co*., 285 NLRB 1313, 1316 (1997), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988), in which the Board held that a demonstration at the hearing concerning the relevancy of the information sought was sufficient to trigger the employer's obligation to furnish the information.

The Union has the responsibility of administering the collective-bargaining agreement and evaluating and processing grievances. *Clinchfield Coal Co*., 275 NLRB 1384 (1985). Respondent is required to furnish requested information which is relevant and reasonably necessary to the Union's performance of those duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v. Truit Mfg. Co*., 351 U.S. 149 (1956). The standard for determining relevancy is a liberal one and it is only necessary to show a ''probability that the described information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial*, supra at 437.

An evaluation of the actual skills necessary to the performance of the multiskilled classification is relevant to the grievance allegation that the job description and labor grade for that classification are erroneous, and would clearly be useful to the Union in evaluating the grievance.

The remaining question is whether Respondent need grant access to the Union's expert to enable the evaluation of the job to take place. The answer requires the application of the Board's test set forth in *Holyoke Water Power Co*., 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), as follows:

> Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property right will predominate, and the union may properly be denied access.

There is no adequate substitute for actual on-the-job observation of the work performed for the purpose of ascertaining what skills are actually utilized and what operations are actually performed by employees in the multiskilled classification. Inasmuch as Respondent's human resources manager, Bauer, knows of no company policy prohibiting non-employees from access to its facility, it would not compromise Repondent's property rights to permit the Union's expert to enter the premises to evaluate the multiskilled job dates and for periods of reasonable duration to be agreed on by the Respondent and the Union in good-faith negotiations.

Respondent offers the following affirmative defenses:

1. The charge is barred by the statute of limitations

The charge was filed on October 5. The first request for permission to bring in an expert took place in September. All events with which this case is concerned took place within 6 months of the filing of the charge or after the filing of the charge. The charge is broad enough to cover the complaint allegations. Respondent repeatedly asserts that a timestudy was requested. This is simply not accurate, nor is its claim that paragraph 8 of the complaint is predicated on a refusal to grant access to have a timestudy performed and does not cover a request for an evaluation. Paragraph 8 plainly states that Respondent failed and refused ''to permit the Union access to the Marlin plant for an evaluation by a timestudy expert.'' That allegation does not limit an evaluation to a time-study nor is there any probative evidence that was the Union's intention. Respondent's repeated references to a ''time stldy'' request are unpersuasive argument.

Respondent further argues that the passage of more than 6 months since the denial of access, the closing of the record, the apparent abandonment of ''its request for a time study,'' and no appropriate amendment of the complaint, requires that ''prosecution of Respondent's denial of access to have a timestudy performed is barred by the statute of limitations, and the complaint must be dismissed.'' I perceive no need to perform a lengthy dissection of less convoluted and mistaken argument. Suffice it to say, neither this nor the earlier argument establishes that Section 10(b) of the Act[4] in any way suggests that the compIaint before me should be dismissed in whole or in part.

2. The complaint fails to state a claim on which relief may be granted since the information requested is not relevant

The information requested is relevant for reasons recited above, and this defense has no merit.

[4] Sec. 10(b) provides in relevant part that ''no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof on the person against whom the charge is made.''

3. Finding a violation of Section 8(a)(1) and (5) of the Act based on Respondent's refusal to grant access for a ''job evaluation'' violates Respondent's right to due process

Contrary to Respondent, it was given timely notice of the violation alleged, proceeded to trial, had opportunity to call and examine and cross-examine witnesses, was in no way restritcted in its defense, and may not now be heard to erroneously complain it was not accorded due process.

4. Assuming arguendo that the Union's request for information is relevant, Respondent's property right must predominate and Respondent's denial of access did not violate the Act

Respondent has presented only argument, no evidence, that its property rights are at hazard, and Baller's acknowledgement there is no policy of excluding nonemployees militates against that argument.

5. The Union has waived its right to the requested information, settled the dispute, and is therefore bound by Section 8(d) of the Act

Respondent argues the negotiation of a new collective-bargaining agreement which contains a wage increase for the multiskilled classification is a waiver of the Union's right to access. Respondent makes a misleading argument by asserting the agreement contained a ''bargained-for increase in the wage rate for the multiskill classification.'' In fact there was no bargaining specifically related to the multiskilled classification. Instead, there was a negotiated across-the-board increase for all classifications. This had nothing to do with whether the job is correctly classified or graded or whether the Union is entitled to the relief the complaint seeks. What Respondent has here done is misstate the facts. There was no ''bargaining which included, under Section 8(d) of the National Labor Relations Act, agreement on the multiskill craft classification and an appropriate rate therefor.'' As General CounseI correctly notes, a contractual waiver of a right to information must be in clear and unmistakable language. *Clinchfield Coal Co*., 275 NLRB 1384 (1985). No such waiver is here present.

6. The complaint must be dismissed as the underlying charge should have been deferred to arbitration

Respondent misconstrues the complaint before me and the law pertaining thereto. The issue of the merit of the grievance is not before me. The only issue to be here decided is whether Respondent violated the Act by refusing access to relevant information sought for the purpose of determining whether to further press the grievance. It is well settled that the requirement that employers furnish a union relevant and reasonably necessary information on request in order to enable the union to evaluate the merit of the grievance is necessary to avoid a two-tiered arbitration process and lengthy delays in grievance resolution. *Acme Industrial Co*., supra; *General Dynamics Co*., 268 NLRB 1432 (1984); and compare *Frank Chervan, Inc*., 283 NLRB 752 fn. 2 (1987), in which an alleged settlement of the grievance and additional issues other than the failure to furnish information were deferred to arbitration should the union decide to pursue the grievance after receiving the information.

In addition to the foregoing, Respondent, in its answer to the complaint, raised but did not discuss laches as a defense, and did not discuss laches in its posttrial brief. Inasmuch as there is no showing concerning why the doctrine of laches is applicable, and it has long been settled that laches does not apply in Board proceedings, *W. C. Nabors Co*., 134 NLRB 1078, 1079 fn. 3 (1961), the laches defense must be and is rejected.

Conclusion

The evidence preponderates in favor of a finding, which I make, that Respondent violated Section 8(a)(5) and (1) of the Act for the reasons alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, the Union has been the exclusive collective-bargaining representative of Respondent's employees in a production and maintenance unit covered by collective-bargaining agreements between Respondent and the Union.
4. By denying the Union's request for access to the Respondent's plant to evaluate the multiskilled job, the Respondent has failed and refused to bargain with the Union in good faith, and has thereby violated Section 8(a)(5) and (1) of the Act.
5. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Exxon Chemical Company, Marlin, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying the Union's requests for reasonable access to Respondent's plant to make an evaluation of the multiskilled job that is relevant and necessary to the Union's performance of its responsibilities as the collective-bargaining representative of Respondent's employees in a production and maintenance unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, grant it access to Respondent's Marlin, Pennsylvania plant for reasonable periods of time at reasonable times, in order to permit the Union to evaluate the multiskilled position, which evaluation is relevant and necessary for the Union's processing of the August 20, 1990 grievance relative to the multiskill job classification.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Post at its facilities in Marlin, Pennsylvania, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''